United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

76-1177

To be argued by
HAROLD JAMES PICKERSTEIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1177

UNITED STATES OF AMERICA,
Appellee,

—v.—

WILLIAM EUGENE ROBINSON,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

PETITION FOR REHEARING

PETER C. DORSEY
United States Attorney
District of Connecticut

HAROLD JAMES PICKERSTEIN
Chief Assistant United States Attorney

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PETITION FOR REHEARING

Statement of the Case

This is a petition for rehearing of a judgment of the United States Court of Appeals for the Second Circuit entered on October 29, 1976, reversing and remanding a judgment of the United States District Court for the District of Connecticut finding the defendant guilty of bank robbery in violation of Title 18, United States Code, Section 2113(a), (b).

The opinion of this court is not as yet reported.

Grounds for Rehearing

1. The record below does not show that the trial judge erred in admitting into evidence records of the Connecticut Department of Labor.

2. The record below does not show that the Government deliberately manipulated witnesses in order to avoid unfavorable testimony concerning the records of the Connecticut Department of Labor.

ARGUMENT

I.

The admission of the records of the State Department of Labor was not error.

In order to impeach the alibi testimony of Joseph Burroughs, the Government sought to introduce records of the Division of Employment Security, Department of Labor, which showed that on the date of the bank robbery, February 18, 1975, Burroughs had not received an unemployment compensation check. This evidence was significant for Burroughs had testified that on the date of the bank robbery he was with the defendant all day, and that he remembered this date because he had picked up his last unemployment compensation check. (Tr. 433-34).

This Court found error in Judge Zampano's decision to allow Walter Glennon, an employee of the State Labor Department, to testify on the basis of an incomplete file of Burroughs, and also in his statement to defense counsel that the question of trustworthiness of the records was a question of weight which would be explored on cross-examination. The record below does not support this finding.

After the offer of the records of Burroughs as maintained by the State Labor Department was made by the Government, the defendant was allowed a lengthy voir

dire of Glennon. (App. 157-181).* Glennon testified that if a payment was made, the only document kept which would be evidence of this fact was the claim and the check. (App. 163). He also testified that the evidence of whether or not a man was paid compensation on a particular day was the claim record card for that man, which Glennon had in Court with him. (App. 163-164). After the voir dire, Glennon was asked by the Court:

> The Court: We are interested, Mr. Glennon, whether or not a payment from your office was made on February 18, 1975. Without telling us what the answer is, I first want to know can you answer that question from the documents you have in front of you, whether or not an unemployment check was paid to a particular person on a particular date in February; namely, February 18, 1975.
>
> The Witness: Yes, I can.
>
> The Court: In other words, if you were asked did Mr. Joseph Burroughs receive an unemployment compensation check on February 18, 1975, you could look at your records and answer that question?
>
> The Witness: I could.
>
> The Court: All right. Objection is overruled. (App. 173-174).

Therefore, the Court found not only that the witness could answer the question from the records which he had brought with him, but also that the records which he had brought with him were of sufficient trustworthiness as to make them admissible as business records. But

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* References marked "App." refer to Appellant's Appendix.

the inquiry did not end here. After the defendant objected on the grounds of relevance and completeness, (App. 175), Judge Zampano put some further questions to Glennon:

> The Court: I am missing something. Mr. Glennen, how can you tell me that you can determine if a check has been paid on a certain date, if Mr. Craig is correct when he says—if he is correct—that you do not have the records here with you, that they are not up to date?
>
> The Witness: The local office records are up to date, your Honor, and I have those with me.
>
> The Court: Do you have those with you?
>
> The Witness: Yes.
>
> The Court: All right, let me ask you the question again:
>
> Can you tell me if a person walked into the Unemployment office in Bridgeport and got paid a check—can you tell me whether or not that check was paid on February 18, 1975, if his name was Joseph Burroughs?
>
> The Witness: By the records that I brought wtih me, I can, your Honor.
>
> The Court: What record are you now looking at to give me that information?
>
> The Witness: The local office records from Bridgeport. (App. 176-177).

At this point, defense counsel indicated his objection on the basis of completeness; namely, that there was another document which Glennon had not brought with him. (App. 177-178). The Court properly indicated that this

objection went to weight, not admissibility. (App. 178). Once the Court found that the requirements of the business record exception to the hearsay rule had been met, the evidence became admissible; any further inquiry concerning it was a matter of weight for the jury.

Finally, when the Court asked defense counsel: "Your objection is that there may be other records that would indicate something else?", (App. 180), defense counsel answered, "That is correct." The Court again indicated that on this basis, the objection went to the weight of the evidence, and not to the threshold issue of its admissibility. (App. 180). Judge Zampano was clearly satisfied that the Government's offer of the records met the requirements of the business records exception; they were kept in the ordinary course of business, it was the ordinary course of that business to keep such records, Glennon was a witness familiar with the records and able to interpret them, and that there was nothing to indicate that the records themselves were not worthy of belief.[1]

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[1] Indeed, there is no affirmative evidence in the record that the records themselves were not reliable. The only thing in the record is the offer of Porter's inadmissible hearsay, referred to in footnote 5 of the Court's opinion. This offer should not be the foundation of an appeals court's finding Government impropriety nor a reversal of a trial court ruling otherwise soundly founded in the record. The defendant thus never introduced any evidence at all to establish that the records produced by Glennon could not be relied upon. With respect to the Porter testimony itself, it is useful to note the comment of Judge Gesell, of the District of Columbia, in *United States* v. *Mathews*, Criminal No. 319-72 (D.D.C. Oct. 5, 1973), aff'd mem. No. 73-1545 (D.C. Cir. Mar. 12, 1974), cited in *"United States* v. *Nobles*: A Prosecutor's Perspective", 14 American Crim. L. Rev. 1, 4 (1976) "All my experience has been that the investigators for the Public Defender Service are unreliable . . . I have never had one before me that was shown to be very mistaken and inadequate in his reports, biased and lacking in the kind of requirements expected of an investigating officer."

It is thus clear that Judge Zampano properly admitted the records into evidence, and also did not preclude defense counsel from pressing his claim that there might be additional records which would either impeach Glennon, or would affirmatively establish the defendant's claim. This is not error.

The Court also suggests that the Government's point would have been made by using the procedure of F.R. Evidence 803(10) to establish the non-occurrence of an event by the lack of an entry. However, since the date of February 18, 1975, was so crucial to Burrough's testimony, it also became important for the Government to establish that Burroughs may have been mistaken as to the date. Therefore, Glennon also testified that Burroughs received an unemployment check on February 10, 1975 (App. 181), and that he did not receive another one until August of 1975. (App. 182). Therefore, F.R. Evidence 803(6) and 803(7) applied; there was ample basis for Judge Zampano to determine that the records were themselves sufficiently trustworthy to allow their admission. Clearly by his inquiry to the witness Glennon, Judge Zampano impliedly found sufficient trustworthiness in the records to allow their admission. The fact that there may have been something else which would refute Glennon's testimony was properly found by Judge Zampano to be a matter of weight, and not admissibility. Furthermore, for the purpose for which the records themselves were offered, it was sufficient for the Court to find, based upon Glennon's own statement, that he could, from the records which he had brought with him, testify as to whether or not Burroughs had received a check on February 18, 1975. This statement alone strongly indicates that the search that was conducted had disclosed the documents from which the witness could testify; nothing in the Federal Rules of Evidence requires more.

II.

There is nothing in the record to establish misconduct by the prosecutor.

The Court strongly indicates in its opinion that the reason that Kegler, the person who had allegedly conducted the search of the unemployment records, was not called by the Government was because his testimony would have been unfavorable. There is no basis in the record for this assumption.

When it became apparent that the defendant would rely upon an alibi, the Government filed a Notice of Alibi pursuant to F.R. Crim. P. 12.1. (App. 151). The defendant responded and named Burroughs as the alibi witness. (App. 152). The Government thereafter indicated that it would call John Pescatelli, Assistant Director, Employment Security Division, State Department of Labor, to refute the Burroughs alibi. (App. 153). Indeed, on January 12, 1976, the Government issued a subpoena duces tecum to Mr. Pescatelli or his designated representative; this subpoena is reproduced in the addendum to this petition. On January 30, 1976, the date of presentation of State Department of Labor evidence, Glennon appeared as the witness provided by the State Labor Department. There is nothing in the record to suggest, and the Government here represents, that it had any knowledge of Kegler until the defendant offered the testimony of his investigator that Kegler had told the investigator that the records were "confused". Thus the record clearly indicates that there was no attempt by the Government to avoid Kegler, a State official of whom it had no knowledge. The subpoena sought the record evidence, leaving it to Pescatelli to appear in person or by delegate. He apparently chose Glennon. The Government did not. Indeed, defense counsel, who was well experienced in the trial of criminal cases, never made this claim, either at trial or on appeal. The claim was

never made, of course, because there is simply no basis for it.[2]

The opinion of the Court, therefore, virtually condemns the Government for manipulating evidence in this case, when there is no basis for assuming that the Government ever heard of Kegler. Part of the basis for its opinion rests on that assumption and the result is the casting of an unfounded, and unfair, aspersion on the Government's conduct of the trial below.

CONCLUSION

For all the foregoing reasons, the United States of America submits that the opinion of the Court with respect to the admission of the records of the Connecticut Department of Labor was not error. The United States of America further submits that there is no basis in the record for the suggestion of the Court that the Government manipulated witnesses wtih respect to this evidence in order to avoid unfavorable evidence.

Accordingly, the United States of America urges the Court to grant a rehearing of this case.

Respectfully submitted,

PETER C. DORSEY
United States Attorney
District of Connecticut

HAROLD JAMES PICKERSTEIN
Chief Assistant United States Attorney

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[2] It is only pure supposition that the records were in fact confused. Glennon never so testified; the only evidence of confusion was the hearsay statement of an investigator for the Public Defender's Office. This evidence was, as recognized by the Court, hearsay, and was properly excluded.

ADDENDUM

Subpoena to Produce Document or Object

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF CONNECTICUT
Cr. No. N-75-20

UNITED STATES OF AMERICA
v.
WILLIAM ROBINSON

To John Pescatelli, Assistant Director (or his authorized representative)
Employment Security Division, Connecticut State Labor Department
200 Folly Brook Road, Wethersfield, Connecticut

You are hereby commanded to appear in the United States District Court for the District of Connecticut at U.S. Post Office Bldg. 141 Church St., Room 208 in the city of New Haven on the 20th day of January 1976 at 9:30 o'clock A. M. to testify in the above case and bring with you All Connecticut State Unemployment Compensation Commission records for Joseph Burroughs, 329 Stratford Avenue, Bridgeport, Connecticut, Social Security No. 247-92-6318, age 22, for the period January 1, 1975, through August 1, 1975.

This subpoena is issued upon application of the [1] United States.

January 12, 1976.

HAROLD JAMES PICKERSTEIN
Ch. Asst. Attorney for the United States
915 Lafayette Blvd., Bridgeport, Ct.

SYLVESTER A. MARKOWSKI,
U.S. Magistrate [2] or Clerk.

By ....., *Deputy Clerk.*

[1] Insert "United States," or "defendant" as the case may be.

[2] A subpoena shall be issued by a Magistrate in a proceeding before him, but need not be under the seal of the court. (Rule 17(a), Federal Rules of Criminal Procedure)

★ U. S. Government Printing Office 1976— 714—020—304

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 76-1177

U S A,

Appellee,

v.

WILLIAM EUGENE ROBINSON,

Appellant.

AFFIDAVIT OF SERVICE BY MAIL

Patricia O'Hara, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 51 West 70th Street, New York, New York 10023

That on the 10th day of November, 1976, deponent served the within Petition for Rehearing upon Andrew B. Bowman, Esquire, Federal Public Defender, 770 Chapel Street, New Haven, Connecticut 06510
Gregory B. Craig, Esquire, 30 South Street, Middlebury, Vermont 05753

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Sworn to before me,

Patricia O'Hara

This 10th day of November 1976

Shirley Amaker

SHIRLEY AMAKER
Notary Public, State of New York
No. 24 - 4502766
Qualified in Kings County
Commission Expires March 30, 1977